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Case No. 05-8794

CAPITAL CASE UNDER ACTIVE WARRANT

IN THE SUPREME COURT OF THE UNITED STATES

CLARENCE EDWARD HILL,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI AND STAY OF EXECUTION

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

*CAROLYN M. SNURKOWSKI
ASSISTANT DEPUTY ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050
(850) 414-3300

*Counsel of Record

QUESTIONS PRESENTED

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ERRED IN REJECTING HILL'S 42 U.S.C. §1983 CLAIM REGARDING THE VALIDITY OF LETHAL INJECTION AS A METHOD OF EXECUTION IN FLORIDA?

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OPINION BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit appears as Hill v Crosby, 2006 U.S. App. LEXIS -- (11th Cir. Jan. 24, 2006).

JURISDICTION

Petitioner invokes this Court's jurisdiction to review the denial of Hill's 42 U.S.C. §1983 action in this capital case presently set for execution January 24, 2006 at 6:00 P.M.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts the constitutional provisions involved.

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition in the Court Below

Clarence Hill and his accomplice, Cliff Jackson, robbed a Savings and Loan Association in Pensacola, Florida, on October 19, 1982. In Hill's attempt to escape and prevent the immediate apprehension of his co-defendant, Hill stealthily approached the police officers attempting to handcuff Jackson, drew his gun and shot both officers, killing one and wounding the other. Hill was indicted on November 2, 1982, for the first-degree murder of Officer Stephen Taylor, attempted first-degree murder of Officer Larry Bailly, three counts of armed robbery and possession of a firearm during the commission of a felony. On April 29, 1983, with the jury convicted Hill of both first-degree murder and felony murder as alleged in Count I. Following sentencing phase, the jury returned a 10-2 death recommendation and on May 17, 1983, the trial court concurred. The Florida Supreme Court affirmed Hill's convictions, but reversed the death sentence. Hill v. State, 477 So.2d 553 (Fla. 1985).

Resentencing occurred on March 24-27, 1986. A number of witnesses testified in behalf of Hill in mitigation. The defense

presented five character witnesses besides Hill's parents.[1] Additionally, Dr. James Larson, a psychologist who examined Hill on December 22, 1982, to ascertain whether Hill suffered from any mental disability; whether there was any need for involuntary hospitalization and for purposes of discovering any evidence in mitigation, was called. Dr. Larson concluded Hill was of average intelligence but scored borderline retarded when it came to verbal ability; he found no evidence of mental disorder of psychosis; he reviewed a plethora of school and medical records and found nothing in the records that Hill suffered from any mental dysfunction. Following all of the testimony, the jury recommendation death 11-1. The trial court determined death was the appropriate sentence.[2] The Florida Supreme Court, on appeal, affirmed the reimposition of

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[1] This testimony in sum reflects that Hill, at various points in his life, was a nice boy and very pleasant. He was helpful to his parents and neighbors and none of the witnesses believed he committed the murder. The State's objections were sustained with regard to efforts by defense counsel to permit Hill's mother to testify concerning how she cared for children when Hill was growing up. The State's objection was also sustained as to the testimony of Hill's father regarding the father's disability from a recent heart attack.

[2] The court found based upon five (5) statutory aggravating factors: (1) that Hill had previously been convicted of another capital offense or violent felony; (2) Hill knowingly created a great risk of harm or danger to many persons; (3) the murder was committed while Hill was engaged in the commission of a robbery; (4) the murder was committed for the purpose of avoiding or preventing a lawful arrest or escaping from custody, and (5) the murder was cold, calculated and premeditated; and only one (1) mitigating factor, that Hill was twenty-three years old at the time the crime was committed, articulated in the sentencing order.

the death penalty in Hill v. State, 515 So.2d 176 (Fla. 1987), cert. denied, 485 U.S. 993 (1988), however the court struck the CCP aggravator.

On November 9, 1989, the Governor signed a death warrant scheduling Hill's execution for January 25, 1990. Hill filed his initial motion for post-conviction relief in the trial court on December 11, 1989, asserting fifteen (15) claims.[3]

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[3] Hill timely filed a motion for post-conviction relief on the following grounds: (1) the prosecutor peremptorily excused black prospective jurors solely based upon their race, in violation of the sixth, eighth, and fourteenth amendments to the United States Constitution and article one, section 16, of the Florida Constitution, and appellate counsel was ineffective in not arguing this issue on direct appeal; (2) the trial court erred when it responded to questions from the jury and refused to disclose to Hill and his counsel the questions asked, in violation of Hill's fifth, sixth, eighth, and fourteenth amendment rights; (3) Hill's capital trial and sentencing proceedings were rendered fundamentally unfair and unreliable, and violated the fifth, sixth, eighth, and fourteenth amendments, due to the prosecution's deliberate and knowing presentation and use of false evidence and arguments and its intentional deception of the jury, the court, and defense counsel; (4) Hill was denied the effective assistance of counsel at the guilt-innocence phase of his trial, in violation of the sixth, eighth, and fourteenth amendments; (5) Hill was denied the effective assistance of counsel at the sentencing phase of his trial, in violation of the sixth, eighth, and fourteenth amendments; (6) Hill's sixth, eighth, and fourteenth amendment rights were violated because counsel unreasonably failed to present critical mitigating evidence and failed to adequately develop and employ expert mental health assistance, and because the experts retained at the time of trial failed to conduct professionally adequate mental health evaluations; (7) the cold, calculated, and premeditated aggravating circumstance was applied to Hill's case, in violation of the eighth and fourteenth amendments; (8) this Court's failure to remand for resentencing after striking an aggravating circumstance on direct appeal denied Hill the protections afforded under Florida's capital sentencing statute, in violation of due process, equal protection, and the eighth and fourteenth amendments; (9) Hill was denied his eighth and fourteenth amendment rights because the jury was not properly instructed concerning the improper doubling of aggravating factors; (10) Hill's death sentence was imposed in violation of the eighth and fourteenth amendments because his jury was prevented from giving appropriate consideration to, and his trial judge refused to consider, all evidence proffered in mitigation of punishment, contrary to *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed. 2d 1 (1982), *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L. Ed. 384 (1988) and *Hitchcock* v. *Dugger*, 481 U.S. 393,

107 S.Ct. 1821, 95 L. Ed. 2d 384 (1987), (11) during the course of Hill's trial the court improperly stated that sympathy and mercy toward Hill were improper considerations, in violation of the eighth and fourteenth amendments; (12) Hill's sentence of death was based upon an unconstitutionally obtained prior conviction and therefore upon misinformation of constitutional magnitude, in violation of the eighth and fourteenth amendments; (13) Hill's jury was improperly instructed, resulting in fundamentally unfair convictions and sentences, in violation of the fifth, eighth, and fourteenth amendments; (14) Hill's sentence of death violates the fifth, sixth, eighth, and fourteenth amendments because the penalty phase jury instructions shifted the burden to Hill to prove that death was inappropriate and because the sentencing judge himself employed this improper standard in sentencing Hill to death; and (15) the application of rule 3.851 to Hill's case will violate, and the present warrant has violated, his rights to due process and equal protection of the law and denied him his right of reasonable access to the courts. Hill v. State, 556 So.2d 1385, 1387 (Fla. 1990).

On January 18, 1990 Hill's postconviction motion was denied without evidentiary hearing, and an appeal therefrom was also decided adversely to Hill.[4] Hill v. Dugger, 556 So.2d 1385 (Fla. 1990).

On January 7, 1990, Hill filed his federal petition for writ of habeas corpus, asserting eighteen (18) claims.[5] Relief was denied as to all claims "except for two issues".[6]

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[4] Hill raised fourteen (14) claims for review on appeal from the summary denial of all relief. The Florida Supreme addressed three issues specifically, finding that the additional evidence of Hill's substance abuse did not rise to a level of objectively establishing a head injury and therefore, was merely cumulative evidence; trial counsel was not ineffective based on the allegations presented; and appellate counsel did not render ineffective assistance for failing to assert on appeal alleged improper peremptory excusal by the state of prospective black jurors based on the status of the law at the time.

The Florida Supreme Court also rejected the nine (9) issues raised in the habeas corpus contemporaneously thereto.

[5] On January 28, 1990, the U.S. District Court stayed Hill's scheduled execution.

[6] On August 31, 1992, District Court Judge Stafford granted Hill's federal Petition for Writ of Habeas Corpus based on Parker v. Dugger, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991), and Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), violations, in Hill v. Singletary, Case no. TCA 90-40023-WS.

Hill continued to prosecute his appeal in the Eleventh Circuit Court of Appeals, however, when the time came for filing his Initial Brief, he filed a motion to have the matter held in abeyance in that Court until such time, as the issues upon which he prevailed, were resolved by the state courts.

The case returned to the Florida Supreme Court on a limited remand for the purpose of ascertaining whether the striking of one of the statutory aggravating factors (CCP) and factoring in

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"unrebutted", nonstatutory mitigating evidence would have resulted in the imposition of the death penalty. The issue before the Florida Supreme Court was what effect the "unrebutted nonstatutory mitigation" tendered by Hill would have had if four, rather than five, statutory aggravating factors were presented to the trial court and whether, the aforenoted omissions constituted harmless error.

The direct appeal was reopened on a limited basis in Hill v. Florida, 643 So.2d 1071 (Fla. 1994):

> Hill raises eleven claims in this appeal,[2] only one of which deals with the Parker issue. Hill maintains that all eleven claims are properly before this Court because the federal district court found constitutional error that 'infected' Hill's sentence, thus effectively reopening his direct appeal as to any issue, the State maintains that all but the Parker issues are procedurally barred.
>
> In granting Hill's motion to reopen his direct appeal, we accepted jurisdiction for the limited purpose of considering the federal district court's partial grant of his habeas petition. In no way did we intend to reopen Hill's direct appeal for the purpose of allowing him to raise other issues that are procedurally barred either because he previously failed to raise them on direct appeal or because the issues were previously determined to be without merit. Consequently, we limit our consideration in this appeal to the Parker issue and decline to consider the other issues raised by Hill.
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> [2] Hill claims that: (1) the judge's and jury's application of cold, calculated, and premeditated was harmful error; (2) the trial judge erred in failing to weigh nonstatutory mitigating evidence; (3) the failure to properly instruct the jury on the improper doubling of aggravating factors warrants a new penalty phase proceeding; (4) irrelevant and inflammatory evidence perverted the penalty phase proceedings; (5) blacks were erroneously excluded from the jury solely on the basis of race; (6) the trial judge erroneously responded to questions from the jury and refused to disclose to Hill the content of the questions; (7) the trial judge erroneously refused to allow Hill to present certain mitigating evidence; (8) the trial judge erroneously refused to excuse certain jurors; (9) the jury instruction shifted the burden to Hill to prove death was inappropriate and the court used the wrong standard in sentencing Hill; (10) the jury's sense of responsibility

> was diluted because it was told that its decision was merely advisory; and (ii) the jury was improperly instructed regarding the offenses for which Hill was charged. 643 So.2d at 1073.

Following remand, the district court concluded that the Florida Supreme Court had satisfied the dictates of Parker, and denied relief. (Order dated November 20, 1996.) The Eleventh Circuit affirmed the district court's denial of all relief in Hill v. Moore, 175 F.3d 915 (11th Cir. 1999), cert. denied, 528 U.S. 1087 (2000).

On or about June 20, 2003, Hill filed a successive motion for post-conviction relief, and on May 26, 2004, the trial court denied the four-prong attack regarding the application of Ring v. Arizona, 536 U.S. 584 (2002). The Florida Supreme Court denied appellate review Hill v. State, 904 So.2d 430 (Fla. 2005).

The Governor signed a new death warrant on November 28, 2005, setting the warrant week to run from noon, Monday, January 23, 2006, through noon, Monday January 30, 2006, with the execution set for Tuesday, January 24, 2006, at 6:00 P.M.

On December 15, 2005, Hill filed the latest postconviction litigation in the trial court, raising six (6) claims. On December 23, 2005, the trial court denied all relief.[7]

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[7] The Court found Claims I (Lethal Injection), II (Mental Retardation), III (Mental Age per Roper v. Simmons), V (Shackling), and VI (Reconsideration of prior 3.850), procedurally barred; and Claim IV (Public Records) Hill's state request for records was satisfied or no colorable basis for postconviction relief was presented, based on the additional public records request outside Rule 3.852(h) Fla.R.Crim.P.

All relief was denied January 17, 2006, when the Florida Supreme Court found that Hill's claims were either procedurally barred or failed to raise a claim upon which relief was warranted. Hill v. State, 2006 Fla. LEXIS 8 (Fla. 2006).

On January 20, 2006, Hill filed a 42 U.S.C. §1983 action in Hill v. Crosby, Case No.:4:06-cv-032-SPM, in the United States District Court, Northern District, asserting that Hill's right to be free from "cruel and unusual punishment under the Eighth and Fourteenth Amendments" are in jeopardy because of the new evidence from The Lancet article regarding lethal injection. The court dismissed the 42 U.S.C. §1983 action, January 21, 2006. Hill appealed to the Eleventh Circuit on January 23, 2006 and the Eleventh Circuit denied Hill's appeal on January 24, 2006.

(ii) Statement of the Facts

The facts as found by the Florida Supreme Court in Hill, 477 So.2d 553, 554 (Fla. 1985) are as follows:

> On October 19, 1982, appellant stole a pistol and an automobile in Mobile, Alabama. Later that day, appellant and his accomplice, Cliff Jackson, drove to Pensacola and robbed a savings and loan association at gunpoint. When the police arrived during the robbery, appellant fled out the back of the savings and loan building. Jackson exited through the front door, where he was apprehended immediately. Appellant approached two police officers from behind as they attempted to handcuff Jackson. Testimony established that appellant drew his pistol and shot the officers, killing one and wounding the other. A gun battle ensued, during which appellant received five bullet wounds.

REASONS FOR DENYING THE WRIT

QUESTIONS PRESENTED (RESTATED)

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ERRED IN REJECTING HILL'S 42 U.S.C. §1983 CLAIM REGARDING THE VALIDITY OF LETHAL INJECTION AS A METHOD OF EXECUTION IN FLORIDA?

Lethal Injection Under 42 U.S.C. §1983 Action

Hill, a state prisoner under a sentence of death, filed his "Petition Under 42 U.S.C. §1983 on January 20, 2006. The State responded that same day and on January 21, 2006, the district court dismissed the action in an Order Dismissing Complaint For Declaratory and Injunctive Relief and denied any stay. Hill appealed on January 23, 2006, and the Eleventh Circuit on January 24, 2006, denied relief.

Hill sought extraordinary appellate review of the denial of this "expedited" action brought pursuant to 42 U.S.C. §1983, contending that he is entitled to relief because the State will use a succession of "three chemicals that will cause unnecessary pain in the execution of sentence of death" on or about January 24, 2006.

Procedurally below, Hill did not identified what administrative remedies he claims were exhausted, albeit he protested below that he exhausted "all avenues". The United States Supreme Court in Nelson v. Campbell, 541 U.S. 637, 643 (2004), contemplated that §1983 "must yield to the more specific federal habeas statute, with its attendant procedural

and exhaustion requirements, where an inmate seeks injunctive relief challenging the fact of his conviction or the duration of his sentence." See 42 U.S.C. §1997e(a).[8]

Hill has **proven** the "caveat" set forth by the Court in Nelson, supra., that claims based on speculation **do not** state a cause of action upon which relief may be granted:

> Finally, the ability to bring a §1983 claim, rather than a habeas application, does not entirely free inmates from substantive or procedural limitations. The Prison Litigation Reform Act of 1995 (Act) imposes limits on the scope and duration of preliminary and permanent injunctive relief, including a requirement that, before issuing such relief, "[a] court shall give substantial weight to any adverse impact on . . . the operation of a criminal justice system caused by the relief." 18 U.S.C.

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[8] The very language Hill used to answer the "V. Exhaustion of Administrative Remedies" in the district court, reflects he was merely attempting to get around successive federal habeas corpus hurdles in his declaration that "Plaintiff has no administrative remedy available as the lethal injection procedure at issue is a prospective violation of his constitutional rights, not ripe for administrative remedy." In Hill's successive postconviction, state court litigation, he identified the last 16 executions by lethal injection in Florida as possible sources of information to "perfect" this argument.

§3626(a)(1) [18 USCS §3626(a)(1)]; accord, §3626(a)(2). **It requires that inmates exhaust available state administrative remedies before bringing a § 1983 action challenging the conditions of their confinement.** 110 Stat 1321-71, 42 U.S.C. §1997e(a) [42 USCS §1997e(a)] ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted"). **The Act mandates that a district court "shall," on its own motion, dismiss "any action brought with respect to prison conditions under section 1983 of this title . . . if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted,** or seeks monetary relief from a defendant who is immune from relief." §1997e(c)(1). Indeed, if the claim is frivolous on its face, a district court may dismiss the suit before the plaintiff has exhausted his state remedies. §1997e(c)(2).

Nelson, 541 U.S. 649 (Emphasis added).

Hill clearly sought to circumvent federal habeas corpus review under 28 U.S.C. §2244 by filing his §1983 action, the sole purpose of which was to

stop any execution. As observed in Nelson v. Campbell, 541 U.S. 637, 644 (2004)(Emphasis added),

> A suit seeking to enjoin a particular means of effectuating a sentence of death does not directly call into question the "fact" or "validity" of the sentence itself--by simply altering its method of execution, the State can go forward with the sentence. Cf. Weaver v. Graham, 450 U.S. 24, 32-33, n. 17, 67 L. Ed. 2d 17, 101 S. Ct. 960 (1981) (no ex post facto violation to change method of execution to more humane method). **On the other hand, imposition of the death penalty presupposes a means of carrying it out. In a State such as Alabama, where the legislature has established lethal injection as the preferred method of execution, see Ala. Code § 15-18-82 (Lexis Supp. 2003) (lethal injection as default method), a constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself. A finding of unconstitutionality would require statutory amendment or variance, imposing significant costs on the State and the administration of its penal system. And while it makes little sense to talk of the "duration" of a death sentence, a State retains a significant interest in meting out a sentence of death in a timely fashion. See Calderon v. Thompson, 523 U.S. 538, 556-557, 140 L. Ed. 2d 728, 118 S. Ct. 1489 (1998); In re Blodgett, 502 U.S. 236, 238, 116 L. Ed. 2d 669, 112 S. Ct. 674 (1992) (*per curiam*); McCleskey v. Zant, 499 U.S. 467, 491, 113 L. Ed.**

2d 517, 111 S. Ct. 1454 (1991) ("[T]he power of a State to pass laws means little if the State cannot enforce them").

Unlike Nelson, Hill is not questioning whether a particular procedure personal to him,[9] is unnecessary to complete his execution. Rather Hill points to a recent research

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[9] In Nelson, 541 U.S. at 646, the Court observed: "If as a legal matter the cut-down were a statutorily mandated part of the lethal injection protocol, or if as a factual matter petitioner were unable or unwilling to concede acceptable alternatives for gaining venous access, respondents might have a stronger argument that success on the merits, coupled with injunctive relief, would call into question the death sentence itself. **But petitioner has been careful** throughout these proceedings, **in his complaint and at oral argument, to assert that the cut-down, as well as the warden's refusal to provide reliable information regarding the cut-down protocol, are wholly unnecessary to gaining venous access. Petitioner has alleged alternatives that, if they had been used, would have allowed the State to proceed with the execution as scheduled.** App. 17 (complaint) (proffering as "less invasive, less painful, faster, cheaper, and safer" the alternative procedure of "percutaneous central line placement"); id., at 37-38 (affidavit of Dr. Mark Heath) (describing relative merits of the cut-down and percutaneous central line placement). No Alabama statute requires use of the cut-down, see Ala. Code §15-18-82 (Lexis Supp. 2003) (saying only that method of execution is lethal injection), and respondents have offered no duly-promulgated regulations to the contrary.

paper published in THE LANCET, which "hypothesizes that this dose may not be administered properly or is possibly being administered in a way that prevents it from having its intended effect. See Koniaris et al., supra. at 1413. The study ultimately concludes that ' public review of lethal injection is warranted.' Id. at 1414." See Hill v. State, 2006 Fla. LEXIS 8 (Fla. Jan. 17, 2006). Specifically, the "letters" provide in conclusion:

> "Our data suggest that anaesthesia methods in lethal injection in the USA are flawed. Failures in protocol design, implementation, monitoring and review **might have** led to the unnecessary suffering of at least **some** of those executed. Because participation of doctors in protocol design or execution is ethically prohibited, adequate anaesthesia **cannot be certain. Therefore, to prevent unnecessary cruelty and suffering, cessation and public review of lethal injections is warranted.**"

Leonidas G. Koniaris et al., Inadequate Anaesthesia in Lethal Injection for Execution, 365 Lancet 1412, 1414 (2005)(Emphasis added).

In denying a stay of execution in a Missouri capital case, wherein Brown brought an identical 42 U.S.C. §1983 action, the Eighth Circuit rejected Dr. Lubarsky's THE LANCET paper, Brown v. Crawford, 408 F.3d 1027 (8th Cir. May 17, 2005), cert. denied, Brown v. Crawford, 162 L.Ed.2d 310, 125 S.Ct. 2927, 2005 U.S. LEXIS 4806 (June 13, 2005). In his dissent, Circuit Judge Bye states that the

issue in Brown, "challenges the chemical protocol used by Missouri to carry out lethal injections. He contends the three-chemical sequence used by Missouri - sodium pentothal, pancuronium bromide, and potassium chloride - creates a foreseeable risk of the gratuitous infliction of unnecessary pain and suffering in violation of the Eighth Amendment."[10]

Hill raised as part of his December 15, 2005, successive state court postconviction litigation the issue of whether "new evidence" has come to light based on "research letters" published in THE

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[10] The dissent also succinctly reports what the specific issue was in Brown,

> "Brown's §1983 action is based in part upon a recently-published article. See L.G. Koniaris, M.D., Inadequate anaesthesia in lethal injection for execution, 365 The Lancet 1412 (Apr. 16, 2005). This article appears to be the first published empirical research showing the three-chemical process used by some states to carry out lethal injections has the possibility of causing unnecessary cruelty and suffering. The study outlined in the article analyzed autopsy toxicology results from forty-nine executions carried out in Arizona, Georgia, North Carolina and South Carolina. The authors conclude in twenty-one of those cases - or 43% - the post-mortem levels of thiopental (sodium pentothal) were consistent with consciousness. In other words, the deceased was likely conscious when the potassium chloride was administered."

LANCET, that evidenced empirical data that execution by lethal injection might be flawed. The state trial court and Florida Supreme Court rejected the very argument made in his federal §1983 pleadings. Hill v State, 2006 Fla. LEXIS 8 (Fla. Jan. 17, 2006), citing Sims, the court held: "The trial court in this case correctly determined that this study does not entitle Hill to relief. As it clearly admits, the study is inconclusive. It does not assert that providing an inmate with "'no less than two' grams" of sodium pentothal, as is Florida's procedure, is not sufficient to render the inmate unconscious. Sims, 754 So.2d at 665 n.17. Nor does it provide evidence that an adequate amount of sodium pentothal is not being administered in Florida, or that the manner in which this drug is administered in Florida prevents it from having its desired effect. n4 And, in Sims, we rejected the claim that the mere possibility of technical difficulties during executions justified a finding that lethal injection was cruel and unusual punishment. Id. at 668." (Footnote omitted).

This Court also recently rejected this identical claim in other cases under warrant challenging lethal injection--Brown v. Crawford, 162 L.Ed.2d 310, 125 S.Ct. 2927, 2005 U.S. LEXIS 4806 (June 13, 2005), and Donald Jones v. Purkett, 04A-912, (April 26, 2004); Hicks v. Taft, 05A-487 (November 29, 2005); Johnston v. Roper, 05A-206 (August 30, 2005).

Moreover in other post-Nelson, cases from the Fifth Circuit, Harris v. Johnson, 376 F.3d 414 (5th Cir. 2004), and White v. Johnson, 429 F.3d 572 (5th Cir. 2005), the court held:

> The district court *sua sponte* dismissed White's action for equitable relief because it determined that, just like the plaintiff in Harris v. Johnson, 376 F.3d 414 (5th Cir. 2004), White waited too long to bring his §1983 claim. We review the district court's *sua sponte* dismissal de novo. Bazrowx v. Scott, 136 F.3d 1053, 1054 (5th Cir. 1998).

"Method of execution actions may be brought in a §1983 suit instead of a habeas petition," but the §1983 claim should "not unduly threaten the State's ability to carry out the scheduled execution." Harris, 376 F.3d at 416 (citing Nelson v. Campbell, 541 U.S. 637, 643-48, 124 S. Ct. 2117, 2123-25, 158 L. Ed. 2d 924 (2004)). Additionally, the fact that "an inmate states a cognizable §1983 claim does not warrant the entry of a stay as a matter of right," and "[a] court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." Nelson, 541 U.S. at 649, 124 S. Ct. at 2125-26 (citing Gomez v. United States Dist. Court., 503 U.S. 653, 112 S. Ct. 1652, 118 L. Ed. 2d 293 (1992) (*per curiam*)). White argues that because he is not requesting a stay, the Supreme Court's pronouncements in Nelson should not apply. These rules, however, were declared by the Court in the context of last-minute §1983 method of execution challenges as well as last-minute stay requests. Id. The principles enunciated by the Court are equally applicable to all types of equitable relief, including permanent injunctions, sought by inmates facing imminent execution.

When weighing equitable remedies, a court "must take into consideration the State's strong interest in proceeding with its judgment and . . . attempts at manipulation." Id. Further, "given the State's significant interest in enforcing its criminal judgments, there is a strong equitable presumption against" last-minute equitable remedy requests. See id. at 650, 124 S. Ct. at 2126. This presumption occurs because the inmate could have brought the action at an earlier time, which would have allowed the court to consider the merits without having to utilize last-minute equitable remedies. See id.

As in Harris, "we do not decide whether [White] properly states a claim under §1983, because even if he does, he is not entitled to the equitable relief he seeks" due to his dilatory filing. 376 F.3d at 417 (citing Gomez, 503 U.S. at 654, 112 S. Ct. 1652). White has been on death row for more than six years, and only now, with his execution imminent, has decided to challenge a procedure for lethal injection that the State has been using for his entire stay on death row. See Harris, 376 F.3d at 417. Like Harris, White has no excuse for delaying his claim until the eleventh hour, and he cannot argue that "he was unaware of the State's intention to execute him by injecting the three chemicals he now challenges." Id. n1

> n1 Additional hurdles face White's complaint that, because the State might use a cut-down procedure to gain venous access, he will be subject to an Eighth Amendment violation. First, it is counter-factual, as the State denies it will resort to this procedure, and White concedes that IV access has been achieved in his hands several times. Second, this claim is

> barred from federal review by White's failure to exhaust it pursuant to the PLRA. See, Underwood v. Wilson, 151 F.3d 292 (5th Cir. 1998).

White, 429 F.3d at 573-74. See also Aldrich v. Johnson, 388 F.3d 159 (5th Cir. 2004) (In the present case, Aldrich's §1983 action challenges the constitutionality of the protocol that Texas will use to execute him, but he does not allege that there is any specific acceptable alternative method that the state could use, or that the proposed protocol is wholly unnecessary to the execution. Thus, contrary to the situation in Nelson, Aldrich's §1983 claim challenging the constitutionality of that protocol and stay of its usage will effectively prevent the state from carrying out his execution. Nelson's holding clearly requires that a capital defendant, in order to assert a §1983 method-of-execution claim, must allege that, because there are alternative methods of execution, the challenged protocol is wholly unnecessary to proceeding with the execution. n11 Because Aldrich did not allege or show that there is any alternative to the protocol that the State proposes to use in his execution, the district court properly dismissed his §1983 action.); and the Sixth Circuit in Hicks v. Taft, 431 F.3d 916 (6th Cir. 2005); Williams v. Bagley, 380 F.3d 932 (6th Cir. 2004) (where similar challenges to the lethal injection method has been litigated).

Terminally in Nelson, 541 U.S. at 649-50:

> Moreover, as our previous decision in Gomez v. United States Dist. Court for Northern Dist. of Cal., 503 U.S. 653, 118 L.Ed.2d 293, 112 S.Ct. 1652 (1992) (per curiam), makes clear, the mere fact that an inmate states a cognizable §1983 claim does not warrant the entry of a stay as a matter of right. Gomez came to us on a motion by the State to vacate a stay entered by an en banc panel of the Court of Appeals for the Ninth Circuit that would have allowed the District Court time to consider the merits of a condemned inmate's last-minute §1983 action challenging the constitutionality of California's use

of the gas chamber. We left open the question whether the inmate's claim was cognizable under §1983, but vacated the stay nonetheless. The inmate, Robert Alton Harris, who had already filed four unsuccessful federal habeas applications, waited until the 11th hour to file his challenge despite the fact that California's method of execution had been in place for years: "This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process. A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." Id., at 654, 118 L.Ed.2d 293, 112 S.Ct. 1652.

A stay is an equitable remedy, and "[e]quity must take into consideration the State's strong interest in proceeding with its judgment and . . . attempt[s] at manipulation." Ibid. Thus, before granting a stay, a district court must consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim. Given the State's significant interest in enforcing its criminal judgments, see Blodgett, 502 U.S., at 239, 116 L.Ed.2d 669, 112 S.Ct. 674; McCleskey, 499 U.S., at 491, 113 L.Ed.2d 517, 111 S.Ct. 1454, there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.

In the instant case Hill's "action" should be dismissed. And even assuming *arguendo*, that he has somehow met the Nelson, supra. test setting forth an independent §1983 action, no stay or relief should be obtained.

As previously noted, Hill asserted the identical arguments in his certiorari petition pending before the Court in Hill v. State,

Case no. 05-8731, filed on or about January 20, 2006, from the denial of postconviction review by the Florida Supreme Court.

The Florida Supreme Court rejected the argument in Hill v. State, 2006 Fla. LEXIS 8 (Fla. Jan. 17, 2006).

> Hill's claim is that a research letter published in April 2005 in The Lancet presents new scientific evidence that Florida's procedure for carrying out lethal injection may subject the inmate to unnecessary pain. See Leonidas G. Koniaris et al., Inadequate Anaesthesia in Lethal Injection for Execution, 365 Lancet 1412 (2005). He supports this claim with an affidavit from one of the study's authors, Dr. David A. Lubarsky, asserting that Florida's procedure is substantially similar to the procedures used in the other states evaluated in the study. Hill ultimately asserts that the information in this study is new information not previously available to this Court when it decided Sims v. State, 754 So. 2d 657 (Fla. 2000). The trial court denied this claim. We agree.

See also, Bieghler v. State, 2005 Ind. LEXIS 1156 (Ind. Dec. 28, 2005), the Indiana Supreme Court likewise rejected the defendant's challenge regarding Indiana's method of execution by lethal injection based on The Lancet research letters.[11]

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[11] Bieghler cites no authority for the proposition that he is entitled to a "pain free" execution, and we have found none. Compare Johnson v. State, 584 N.E.2d 1092, 1107 (Ind. 1992) (fact that electrocution may not cause instantaneous and painless death does not mean that method involves the unnecessary and wanton infliction of pain).

> Both the federal and state constitutions prohibit "cruel and unusual punishment." Punishment may not include torture, lingering death, or the unnecessary and wanton infliction of pain; the method must be compatible with contemporary standards of society. See, e.g., Estelle v. Gamble, 429 U.S. 97, 102, 97 S.Ct. 285, 50 L.Ed.2d 251

(1976); accord Moore v. State, 771 N.E.2d 46, 55-56 (Ind. 2002). Claims that lethal injection violates the prohibition against cruel and unusual punishment have been rejected by courts throughout the county in states that appear to have a drug protocol the same as or similar to Indiana's. See, e.g., Beardslee v. Woodford, 395 F.3d 1064, 1076 (9th Cir. 2005), cert. denied, 125 S. Ct. 982, 160 L.Ed.2d 910 (2005); Cooper v. Rimmer, 379 F.3d 1029, 1031-33 (9th Cir. 2004); Reid v. Johnson, 333 F.Supp.2d 543, 552-53 (E.D. Va. 2004); State v. Webb, 252 Conn. 128, 750 A.2d 448, 454-56 (Conn. 2000), cert. denied, 531 U.S. 835, 121 S.Ct. 93, 148 L.Ed.2d 53 (2000); Sims v. State, 754 So.2d 657, 666-68 (Fla. 2000), cert. denied, 528 U.S. 1183, 120 S.Ct. 1233, 145 L.Ed.2d 1122 (2000); Morrow v. State, 21 S.W.3d 819, 828 (Mo. 2000), cert. denied, 531 U.S. 1171, 121 S.Ct. 1140, 148 L.Ed.2d 1004 (2001); Abdur' Rahman v. Bredesen, 2005 Tenn. LEXIS 828, 2005 WL 2615801, *9-*12 (Tenn. Oct. 17, 2005) (noting that lethal injection is "commonly thought to be the most humane form of execution"); see also McConnell v. State, 102 P.3d 606, 615-17 (Nev. 2004) (the absence of a codified protocol does not render lethal injection an unconstitutional method of execution absent some showing that executions in the state have been administered in a cruel or unusual manner). But see Harris v. Johnson, 323 F.Supp.2d 797, 809 (S.D. Tex. 2004) (concluding prisoner showed likelihood of success sufficient to support a temporary restraining order), vacated, 376 F.3d 414 (5th Cir. 2004) (determining prisoner had unreasonably delayed bringing challenge to execution method).

We have previously rejected claims that lethal injection is cruel and unusual punishment. See, e.g., Johnson v. State, 827 N.E.2d 547, 552-53 (Ind. 2005) (order denying permission to litigate successive post-conviction claims in capital case); Ritchie v. State, 809 N.E.2d 258, 262-63 (Ind. 2004); Moore, 771 N.E.2d at 55-56 (observing that executions must "be performed in a manner that avoids unnecessary or wanton infliction of pain" but concluding that lethal injection does not constitute wanton infliction of pain). We have also noted that "judicial intervention in the details of execution methods is by its nature highly restrained." Benefiel v. State, 716 N.E.2d 906, 918 n.8 (Ind. 1999).

Bieghler has not shown a reasonable possibility of succeeding on his claim because, even if Indiana's protocol was developed without input from a person trained in clinical anesthesiology, Bieghler has not shown the protocol presents any unacceptable risk of a lingering death or the wanton infliction of pain in his case. In this respect, his claim is like the others we have rejected. See Johnson, 827 N.E.2d at 552-53 (rejecting challenge to the drug protocol); Ritchie, 809 N.E.2d at 262-63 (rejecting prisoner's unsupported assertion that lethal injection inflicts "unnecessary pain"); Moore, 771 N.E.2d at 55 n.3 (rejecting prisoner's unsubstantiated contention that his obesity and resulting difficulty in locating a suitable vein would present difficulty in his case). In view of this decision, we do not address the State's argument that this claim is procedurally defaulted because Bieghler waited too long to raise it.

In Hill's postconviction sojourn, he contended that "new evidence" has come to light which brings into question the State Court's holding in Sims v. State, 754 So.2d 657 (Fla. 2000), cert. denied, 754 U.S. 657 (2000). Albeit, the Sims Court rejected the parade of "horribles that could happen if a mishap occurs during the execution. . . " Sims, 754 So.2d at 668, Hill claimed "recent" empirical evidence of the "infliction of cruel and unusual punishment" of execution by lethal injection based on research letters by Dr. Davis A. Lubarsky, published in the April 16, 2005, issue of THE LANCET. Hill argues that "the scientific critique of the use of sodium pentothal, pancuronium bromide, and potassium chloride creates a foreseeable risk of the gratuitous and unnecessary infliction of pain on a person being executed."[12]

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[12] The concluding paragraph of the research letters provides:

"Our data suggest that anaesthesia methods in lethal injection in the USA are flawed. Failures in protocol design, implementation, monitoring and review might have led to the unnecessary suffering of a t least some of those executed. Because participation of doctors in protocol design or execution is ethically prohibited, adequate anaesthesia cannot be certain. Therefore, to prevent unnecessary cruelty and suffering, cessation and public review of lethal injections is warranted. Koniaris L.G., Zimmers T.A., Lubarsji D.A., Sheldon J.P., Inadequate anaesthesia in lethal injection for execution. Vol. 365. THE LANCET 1412-14 (April 16, 2005)."

The research letters of Dr. Lubarsky and colleagues, are not new as far as any objections to the use of lethal injection as a method of execution.[13] Sims, 754 So.2d at 668 footnote 19[14] (Emphasis added).

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[13] Unless Hill demonstrated that the latest research letters either are so new as to not be unearthed or are so unique that new light is shed on this issue, the state trial court and the Florida Supreme Court were bound by their earlier rulings--finding execution by lethal injection constitutional. Robinson v. State, 30 Fla.L.Weekly S576, 2005 Fla. LEXIS 1452 (Fla. July 7, 2005)(affirming summary denial of claim that execution by lethal injection is unconstitutional, holding that Supreme Court has repeatedly rejected the claim as being without merit); Elledge v. State, 911 So.2d 57 (Fla. 2005) (affirming summary denial of claim that execution by electrocution or lethal injection is unconstitutional because it constitutes cruel and unusual punishment, noting that Supreme Court has repeatedly rejected the claim as being without merit); Johnson v. State, 904 So.2d 400 (Fla. 2005)(holding claim that execution by lethal injection constitutes cruel and unusual punishment in violation of both the Florida and United States Constitutions is without merit and was properly denied without an evidentiary hearing); Parker v. State, 904 So.2d 370 (Fla. 2005) (upholding summary denial of claim that execution by lethal injection or electrocution is cruel and unusual punishment because the Court has repeatedly held that neither form of execution is cruel and unusual punishment).

[14] n19 Professor Radelet testified that lethal injection is the most commonly "botched" method of execution in the United States, with Virginia and Texas being the two states with the highest number of mishaps. He claims that 5.2 percent of the lethal injections encountered unanticipated problems. He also provided examples of what could go wrong during the lethal injection, citing to specific examples throughout the country. The professor admitted, however, that the documented occurrences in his study came from newspaper accounts of the execution and did not come from first-hand, eyewitness accounts or formal findings following a hearing or investigation into the matter.

Hill has not shown how any of the lower courts have misapplied the law governing his 42 U.S.C. §1983 action. Moreover Hill is not entitled to any stay pursuant to the Eleventh Circuit's

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Dr. Lipman, a neuropharmacologist, provided examples of what could happen if the drugs are not administered properly or if the personnel are not adequately trained to administer the lethal substances. For example, if too low a dose of sodium pentothal is administered, the inmate could feel pain because low dosages of such drug have the opposite effect--it makes the pain more acute. In addition, if the drugs are not injected in the proper order, the inmate could suffer pain because he would not be properly anesthetized. Dr. Lipman further noted that if the drugs are not administered in a timely manner, the sodium pentothal could wear off, causing the inmate to regain consciousness. However, Dr. Lipman admitted that lethal injection is a simple procedure and that if the lethal substances to be used by DOC are administered in the proper dosages and in the proper sequence at the appropriate time, they will "bring about the desired effect." He also admitted that at high dosages of the lethal substances intended be used by the DOC, death would certainly result quickly and without sensation.

opinion holding: "It is clear to us that the district court lacked jurisdiction to consider appellant's claim because it it the functional equivalent of a successive habeas petition and he failed to obtain leave of the court to file it. . . . we DENY appellant's application for a stay pf his execution pending appeal."

CONCLUSION

Hill is entitled to no relief and the petition for writ of certiorari should be denied in all respects and any request for stay denied.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
Assistant Attorney General
Florida Bar No. 158541

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300 Ext. 4566

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Email and U.S. Mail to D. Todd Doss, 725 SE Baya Drive, Suite 102, Lake City, Florida 32025, this 24th day of January, 2006.

CAROLYN M. SNURKOWSKI
Assistant Attorney General